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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

LAWRENCE MARQUETTE, et al.,
Petitioners

v.

UNITED STATES OF AMERICA, et al.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY TO BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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This Brief is submitted in reply to the Brief of the United States and the Interstate Commerce Commission ("Commission") in opposition to the Petition for Writ of Certiorari herein. This Reply Brief responds to the arguments on the part of the Government that the Commission's record keeping requirements do not violate the proviso clause of Section 220(g), 49 U.S.C. 320(g) (recodified as 49 U.S.C. 11144(c)).

The proviso clause, following a Congressional grant of power to the Commission to gain access to all books and

records of cooperative associations required to give notice under section 203(b)(5) (49 U.S.C. 303(b)(5)), (recodified 10526(a)(5)), states: "That the Commission shall have no authority to prescribe the form of any accounts, records, or memorandums to be maintained by a cooperative association or federation of cooperative associations."

In essence, the Government argues that the Commission's requirements, detailed as they are,[1] "cannot be read to" violate the plain language of the proviso clause because that would make it difficult for the Government.[2] The

[1] The challenged Commission regulations, 49 C.F.R. 1047.22, provide that any cooperative association performing interstate transportation for nonmembers and required to give notice to the Commission shall prepare and retain for at least two years records of all interstate transportation performed for members and nonmembers. The regulation further requires that:

> "Such records shall contain (1) the date of the shipment, (2) the names and addresses of the consignor and consignee, (3) the origin and destination of the shipment, (4) a description of the articles in the shipment, (5) the weight or volume of the shipment, (6) a description of the equipment used either by unit number or license number and, in the event this equipment is nonowned, the name and address of its owners and drivers, (7) the total charges collected, (8) a copy of all leases executed by the cooperative association or federation of cooperative associations to obtain equipment to perform transportation under section 203(b)(5), (9) whether the transportation performed is (i) member transportation as defined in § 1047.20(f), (ii) nonmember transportation for nonmembers who are farmers, cooperative associations, or federations thereof, (iii) other nonmember transportation, and if of class (iii), how such transportation was incidental and necessary as defined in § 1047.21(a)."

[2] We note, for the record, that the Department of Justice, Antitrust Division concluded, in the Court of Appeals that it would "neither support nor oppose the orders of the Interstate Commerce Commission under review" in this proceeding.

Government argues further that because the "form of any records" is not prescribed by the Commission, (apparently defining that term as a government standardized reporting document), the proviso is not violated. (Br. in Opp. 7-8). We urge that this is not supported by logic or the legislative history.

We further submit this argument seeks to circumvent, or render meaningless, the plain language of the statute. It would negate the clear congressional intent of Congress to limit unreasonable encroachments by a regulatory agency on the freedom of private organizations and businesses to conduct their enterprises without unwarranted and burdensome government interference. Section 220(g) was enacted to give specific visitation powers to the Commission so as to clarify confusion regarding those powers which previously existed; it does not give the Commission power to require that Petitioner embark on a whole new series of records compilation at the dictate of the Commission. This provision makes clear that the Commission has power only to inspect and copy records *already kept in the ordinary course of business.*

This conclusion is reinforced by the Senate report on the legislation (90th Cong. 2d Sess. Rep. No. 1152 at 16 (May 28, 1968)):

> "[T]he Commission advised the committee that it understood the purpose of this provision was to clarify the right of the Commission to exercise visitorial powers over the records and books of the associations required to give notice; and, therefore, nothing in this provision would be considered to derogate or otherwise affect the Commission's present powers to investigate the activities of such associations under section 204(c) or to obtain access to their books and records under section 205(d), whether or not the

required notice had been given, where it appeared that the activities of a cooperative were not within the scope of the exemption.

The Committee agrees with the statement of the council witness on the meaning of this phrase, and with the understanding of the Commission that this clarifies the Commission's visitorial powers, and does not derogate from or affect the Commission's other present powers as above stated."

For these reasons, we urge that the Government's arguments be rejected.

CONCLUSION

It is respectively requested that the Petition for Writ of Certiorari herein be granted.

Respectfully submitted,

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